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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Implementation of Sections of the )  
Cable Television Consumer )  
Protection and Competition Act of )  
1992; Sixth Order on )  
Reconsideration )  
 )  
Rate Regulation )

MM Docket 92-266

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To: The Commission

**CABLEVISION INDUSTRIES CORPORATION**  
**COMMENTS ON PETITIONS FOR RECONSIDERATION**

Cablevision Industries Corporation ("CVI") hereby submits its comments on petitions for reconsideration of the Commission's Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Order") in the above-referenced proceeding.<sup>1</sup> CVI comments herein on concerns raised by cable operators that the Commission's shifting policy governing collective a la carte offerings has resulted in inconsistent regulatory treatment of operators who have engaged in similar behavior. CVI believes that the Commission can remedy this unfairness by adopting a simple rule allowing operators who created a la carte packages as of December 31,

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<sup>1</sup>Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking) in MM Docket No. 92-266, FCC 94-286 (rel. Nov. 18, 1994).

1994, with programmers' consent, to convert a limited number of channels from such a package into a New Product Tier ("NPT").

**I. THE COMMISSION HAS APPROPRIATELY ACKNOWLEDGED THAT ITS TESTS FOR UNREGULATED A LA CARTE PACKAGES HAVE CREATED GREAT UNCERTAINTY**

The 1992 Cable Act exempts from rate regulation programming offered on an a la carte basis. See 47 U.S.C. § 543(l)(2). Consistent with this provision, the Commission determined in its April 1993 Rate Order that it would not regulate packages of a la carte channels so long as: (1) the package price is less than the sum of the individual services; and (2) the operator continues to provide the individual services separately so that subscribers have a realistic service choice. 8 FCC Rcd 5631 at ¶¶ 326-328 (1993). Thereafter, the Commission supplemented this seemingly straight-forward test by adopting fifteen "interpretive guidelines" for determining whether an a la carte package should be regulated. Second Reconsideration Order, 9 FCC Rcd 4119 at ¶ 193 (1994). Although well intentioned, the additional guidelines only served to further confuse operators, regulators and consumers.

In the Order, the FCC reversed entirely its prior a la carte policy by finding that all a la carte packages are subject to rate regulation. Order at ¶¶ 45-53. The Commission further determined that operators could create unregulated NPTs provided that they meet certain conditions. Id. at ¶¶ 23-33. Despite the prospective certainty of the NPT policy, however, the Commission conceded that, with respect to some of its

pending Letter of Inquiry ("LOI") a la carte determinations, "it is not clear how [the] test should be applied." Id. at ¶ 51. Given this avowed confusion, it is not surprising that the Bureau's LOI rulings appear to be inconsistent and lacking in a principled basis.

## **II. THE BUREAU'S LOI RULINGS CONTAIN CONTRADICTORY POLICIES THAT CANNOT BE RECONCILED**

CVI believes that the Bureau's LOI decisions fail to articulate a rational policy with respect to the conversion of preexisting tiers or the migration of regulated channels to unregulated NPTs. The FCC has ruled in equity that some operators may convert a la carte packages "not clearly ineligible for unregulated treatment" into NPTs in light of the attendant "confusion and transaction costs." Id.; see, e.g., Century Cable TV, LOI-93-44, DA 94-1426 (Dec. 12, 1994) (permitting migration of 6 channels from 31 channels offered on second and third tiers). At the same time, however, the FCC has prohibited other similarly-situated operators from creating similar unregulated tiers. See, e.g., Vision Cable of North Carolina, Inc. LOI-93-24, DA 94-1552 (Dec. 22, 1994) (forbidding migration of 4 channels from first and second tiers and conversion of a 4 channel third tier).

The basis for this dissimilar treatment is not readily apparent; nor are decisions that deny NPT status to pre-existing affirmatively-offered tiers of service that were

converted to a la carte status in reliance on Commission rules and policy statements.<sup>2</sup> Some operators speculate that the difference is explained by the number of channels migrated (e.g., offerings consisting of eight or more migrated channels have been found invalid) or by the fact that an entire CPST has been eliminated. Common sense would seem to dictate, however, that the Commission would prohibit the migration of 6 channels from a high penetration tier before it would prohibit the conversion of a low-penetration 4 channel tier. Regardless, the Commission has yet to explain in a principled fashion how its sundry policy considerations and regulatory guidelines are weighed and applied. Hence, the LOI rulings have further compounded the uncertainty surrounding operators' a la carte practices.

### **III. THE COMMISSION SHOULD PERMIT OPERATORS WHO OFFERED A LA CARTE PACKAGES TO TREAT A LIMITED NUMBER OF CHANNELS AS A NEW PRODUCT TIER**

Given that the regulatory status of collective a la carte packages remains an unresolved issue in many local and FCC rate proceedings, CVI submits that the Commission should simplify its a la carte policy by permitting operators who created collective a la carte offerings by December 31, 1994 (with programmers' consent) to treat a small number of such migrated channels or an entire tier containing a small number of channels as an unregulated NPT. This easy to apply rule would effectively

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<sup>2</sup> Dynamic Cablevision of Florida, Ltd., LOI-93-43, DA 94-1546 (December 22, 1994).

harmonize the Commission's conflicting a la carte policy pronouncements and rulings, thereby minimizing the current confusion faced by operators, programmers and consumers.

#### **IV. CONCLUSION**

As set forth above, CVI respectfully urges the Commission to clarify its a la carte policy by adopting the clear and consistent rule advocated herein.

Respectfully submitted,

**CABLEVISION INDUSTRIES  
CORPORATION**

By: David L. Testa  
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February 2, 1995